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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 403

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND BRIEF IN SUPPORT THEREOF.

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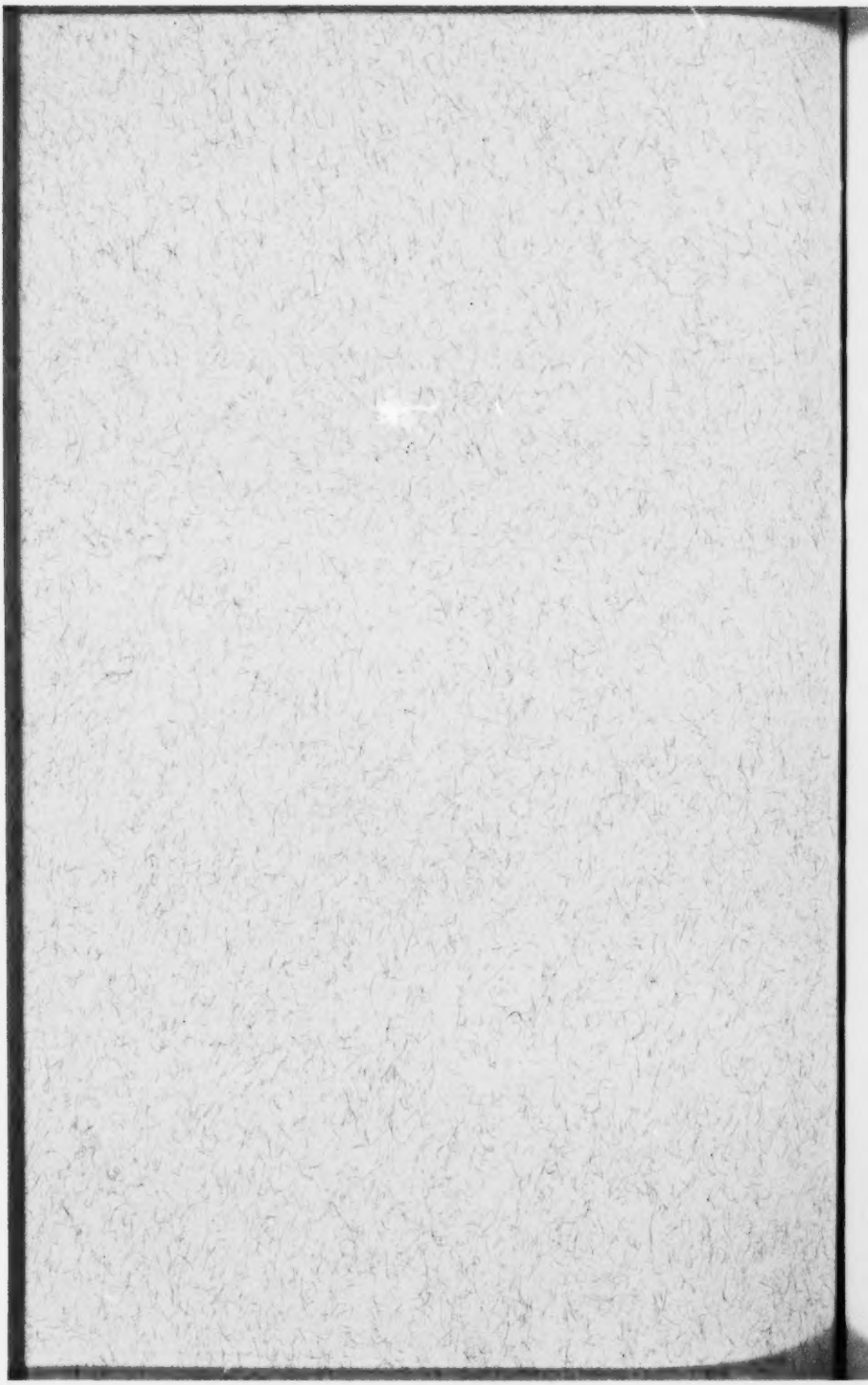
Counsel for Petitioner.

MARVEL AND MORFORD,
Of Counsel.



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IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Phoenix Finance Corporation respectfully represents:

I.

Summary Statement of the Matter Involved.

Petitioner sued respondent in assumpsit in Superior Court of the State of Delaware, for New Castle County, on promissory notes given by respondent to petitioner, the present holder, as follows: (a) note for $3125 dated January 20, 1933, due July 20, 1933 (R. 93), and (b) note for

$2000 dated December 15, 1932, due June 15, 1933 (R. 92). Both notes bore interest at 8%.

Case tried before two Judges of Supreme Court of Delaware sitting as Judges of Superior Court. Jury waived. Sole issue one of law arising from defendant's plea of *res adjudicata.* In support of its plea, defendant offered in evidence record of a certain cause originating in United States District Court for Northern District of Iowa (hereinafter referred to as "Foreclosure Cause") and decree therein dated December 1, 1936.[1]

Judgment based upon written opinion of trial judges, rendered in favor of plaintiff (petitioner herein) for $8,026.60 and costs. Opinion of trial court was to the effect that the decree in the Foreclosure Cause in the Federal Court did not, for the reasons therein stated, have the qualities of an adjudication *in personam* against the plaintiff and did not therefore sustain the plea of *res adjudicata.*

Phoenix Finance Corporation v. *Iowa-Wisconsin Bridge Company,* 14 A. (2d) 386, 40 Del. 500.

On writ of error to the Supreme Court of Delaware, judgment reversed (Decree: R. 144-145; Opinion; R. 131-144) and entry of judgment for defendant (the respondent herein) directed. The Supreme Court after pointing out that a decree or judgment of a Federal Court is entitled to the same sanctity and effect as a decree or judgment of a State court[2] held that the decree of December 1, 1936,

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[1] Foreclosure Record p. 202-204. The printed record of said cause in the Circuit Court of Appeals for the 8th Circuit, the same being No. 11,055, was offered as defendant's Exh. No. 4 (R. 52) and was before the Superior and Supreme Courts of Delaware. See stipulation (R. 3) for filing of copies of this record in Supreme Court of Delaware in lieu of reprinting thereof. This exhibit has been certified as a part of the record herein and in lieu of the reprinting thereof, ten printed copies have been filed for the use of this Court. For convenience and differentiation this exhibit will be herein referred to as the Foreclosure Record or "F.R.".

[2] This is conceded.

in the Foreclosure Cause "was entitled to full faith and credit, and it constituted a complete defense to the action on the notes under the plea of res adjudicata." (R. 144).

Iowa-Wisconsin Bridge Company v. *Phoenix Finance Corporation,* 25 A. (2d) 383, 391.

Whereupon Phoenix Finance Corporation, the plaintiff in the Superior Court and the defendant-in-error in the Supreme Court of Delaware, petitions herein for certiorari. The jurisdictional grounds are next hereinafter stated. The pleadings, parties, issues and decree of the Federal court in the earlier Foreclosure Cause are fully disclosed and discussed under an appropriate heading of this petition.

II.

Statement of Supreme Court's Jurisdiction to Review Decree of the Supreme Court of Delaware.

Section 237 (b) of the Federal Judicial Code as amended (28 U. S. C. A. Sec. 344 (b)) provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; *and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* * * *." (Italics supplied.)

Although judicial proceedings of a Federal Court are not within the express coverage of the full faith and credit

clause, they "must be accorded the same full faith and credit by State courts as would be required in respect of the judicial proceedings of another State."

Knights of Pythias v. *Meyer,* 265 U. S. 30, 33; 44 S. Ct. 432; 68 L. Ed. 885;

Hancock Nat. Bank v. *Farnum,* 176 U. S. 640, 644; 20 Sup. Ct. 506; 44 L. Ed. 619;

Embry v. *Palmer,* 107 U. S. 3, 9; 2 Sup. Ct. 25; 27 L. Ed. 346.

Where in a State court, a right or immunity is set up under and by virtue of a judgment or decree of a Federal court the case is "one in which a title or right is claimed under an authority exercised under the United States" within the meaning of Section 237 (b) of the Judicial Code.

Knights of Pythias v. *Meyer, supra;*

Cumberland Glass Mfg. Co. v. *DeWitt,* 237 U. S. 447, 449; 35 S. Ct. 636; 59 L. Ed. 1042;

Pittsburgh C. C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.,* 172 U. S. 493, 507; 19 S. Ct. 238; 43 L. Ed. 528;

Texas & Pacific Ry. Co. v. *Johnson,* 151 U. S. 81, 98-99; 14 S. Ct. 250; 38 L. Ed. 81;

Factors & T. Ins. Co. v. *Murphy,* 111 U. S. 738, 741; 4 S. Ct. 679; 28 L. Ed. 582.

It was held in *Avery* v. *Popper,* 179 U. S. 305, 314, 21 S. Ct. 94, 45 L. Ed. 203 that "the writ will lie, if the validity or construction of the judgment of the Federal Court, or the regularity of the proceedings * * * are assailed * * *." This was the precise situation in the Delaware Courts. The defendant (respondent here) contended that the decree of December 1, 1936 in the Foreclosure Cause was a valid adjudication with respect to the plaintiff's

(petitioner's) right to maintain an action on the promissory notes in question. The plaintiff contended that said federal decree did not constitute a valid adjudication against it within the issues of the Delaware case and should not be so construed. Within the language of Sec. 237 (b) the *respondent* therefore claimed and set up a "title, right, privilege or immunity" under the authority exercised by the United States.

Moreover, this court has jurisdiction of the question here presented because of a "right, privilege or immunity" claimed by *petitioner* "under the Constitution", *viz.*, the due process clauses of the 5th and 14th Amendments. Where a judgment or decree lacks the qualities to entitle it to full faith and credit "judicial action enforcing it * * * is not that due process which the Fifth and Fourteenth Amendments require."

Hansberry v. *Lee,* 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

Postal Teleg. Cable Co. v. *Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

Old Wayne Mut. Life Asso. v. *McDonough,* 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

As stated by this Court in *Riley* v. *New York Trust Co.,* 62 S. Ct. 608, 86 L. Ed. 551, 558, Adv. Op. No. 81, October Term, 1941, if the effect of a decree "was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process".

The instant case falls within the foregoing principle. The Delaware Superior Court held that the doctrine of representation did not apply so as to bind the plaintiff by the decree of December 1, 1936 in the federal Foreclosure Cause. The Supreme Court on the other hand held that the plaintiff below was bound by such decree by virtue of the

doctrine of representation and that the plea of *res adjudicata* set forth a valid defense. By this petition Phoenix Finance Corporation contends that the decree of the Supreme Court of Delaware deprived it of its property and property rights with respect to the notes in suit by virtue of the sustaining of a defense to the action thereon, based upon an adjudication in a former proceeding to which it was not an indispensable party, in which it was not represented with respect to the issues of the Delaware suit, in which the issues of the Delaware suit were neither involved by pleading or otherwise litigated, in which the decree, responsive to the pleaded issues, was a mere denial of the right of Trustees representing bondholders to foreclose a mortgage, and in which any adjudication against petitioner in respect of the notes in suit was a matter without the constitutional and statutory jurisdiction of a federal court.

It is contended that the decision of the Supreme Court of Delaware sustaining the plea and giving purported faith and credit to the federal decree is a denial of due process under the Fourteenth Amendment. On the other hand, the construction by this or any other Federal Court of the decree of December 1, 1936 in the Foreclosure Cause as constituting an adjudication of petitioner's right to maintain suit on the promissory notes in question would be, it is respectfully submitted, a denial of due process under the Fifth Amendment.

By virtue of Article IV, Section 12 of the Constitution of the State of Delaware, the Supreme Court of Delaware is the "highest court" of that state.[3]

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[3] "Section 12. The Supreme Court shall have jurisdiction as follows: (1) To issue writs of error to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court."

III.

The Federal Decree Relied Upon By Respondent and the Issues, Parties and Proceedings With Respect Thereto.

This was an original proceeding in the United States District Court for the Northern District of Iowa for the foreclosure of a mortgage deed of trust. Original parties: First Trust & Savings Bank *(an Iowa corporation)* and Schubert (*a citizen of Wisconsin*), Trustees, complainants; Iowa-Wisconsin Bridge Company (herein sometimes referred to as "Bridge Company"), *a Delaware corporation*, defendant (F. R. 1-2).

The Bridge Company filed its answer to the bill for foreclosure (F. R. 62-66) denying *inter alia* "that said mortgage deed of trust is a valid and binding lien upon the property as alleged in the complainants' bill". By an amended answer (F. R. 67-68) the Bridge Company prayed for cancellation of "any and all bonds improperly delivered."

One Kendrick filed petition for intervention (F. R. 73-83) in form of cross-bill praying *inter alia* for the cancellation of the deed of trust and bonds (F. R. 82-83).[4] Kendrick then moved (F. R. 83) that *Phoenix Finance System, Inc.*, a Delaware corporation (hereinafter sometimes referred to as "System") together with other corporations "be made parties *defendant* herein" (F. R. 84). Phoenix Finance Corporation, this petitioner and also a Delaware corporation (hereinafter sometimes referred to as "Phoenix") not so named. The named corporations were alleged by the

[4] Master and court gave same effect to intervention petitioner as though it were cross-bill in the right of Bridge Company against Phoenix for cancellation of mortgage and bonds. Intervener Kendrick in certain resistances in Foreclosure Cause refers to petition as a "Cross-Bill" and Phoenix' answer thereto as an "answer to Cross-Bill" (F. R. 207, 393).

motion to be "necessary and proper parties to this cause" (F. R. 84). After hearing leave to intervene was granted (F. R. 86). However the court treated the motion with respect to parties as a motion "to make additional parties *plaintiff* and *defendant to the petition of intervention* (F. R. 86) and in connection therewith, but without pleading or proof, the court by its order made the following statement (F. R. 86):

> "* * * and complaints counsel having stated in open court that the Phoenix Finance Corporation has succeeded the Phoenix Finance System, Inc. and is the holder of the bonds involved in the action with the exception of about $10,000 worth of said bonds."

The court thereupon ordered (F. R. 86):

> "* * * that the Phoenix Finance System, Inc. and the Phoenix Finance Corporation *be made parties plaintiff in this cause and defendants to the petition of intervention* * * *" (emphasis supplied).

System did not appear or answer and service of process as to it was quashed (F. R. 109-110).

Phoenix, as holder of more than 25% of the bonds secured by the deed of trust had requested the Trustees to foreclose, had agreed to indemnify the Trustees for expenses incurred, and had suggested counsel (F. R. 789-791; 794-795). Although there were no pleadings in the cause or prayers for relief directed against it, Phoenix appeared and answered the intervention petition (F. R. 91-92) by pleading ignorance of certain alleged acts of fraud on the part of System, charged as occurring in 1930 and early 1931. Phoenix was not incorporated until December 29, 1931 (F. R. 542). No allegations or subsequent evidence as to identity or succession of interest as between Phoenix and Sys-

tem, appears in Foreclosure Record,[5] except testimony (F. R. 541) defining status as assignee and assignor, respectively, of certain property (not the notes in suit here). *No evidence of fraud on part of Phoenix or on part of System chargeable to Phoenix.*

Issues in Foreclosure Cause referred to a Master (F. R. 107-108). Phoenix *pro se* did not participate in trial before Master nor offer evidence.[6] District Court held trustee complainants had "exclusive control" of the litigation and that Phoenix "was merely a formal and not an indispensable party" (F. R. 211).

The Master held deed of trust and bonds partially valid and partially invalid, and recommended foreclosure (F. R.

[5] There was no merger, consolidation, corporate identity or succession. So decided in *Argenbright et al.* v. *Phoenix Finance Co. of Iowa*, 187 A. 124, 126 (Del. Ch.) and *Graeser* v. *Phoenix Finance Co. of Des Moines*, 254 N. W. 859 (Iowa).

[6] Possible that Phoenix was the victim of procedural error. Tacit understanding of all parties, acquiesced in by Master that evidence would be heard in two distinct stages: (1) issue of validity of deed of trust, and if and when foreclosure decreed, (2) issue as to bonds entitled to participate in proceeds. (F. R. 225, 226, 228-230, 363, 451, 561, 637, 693.) This was in accord with recognized federal procedure (*Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 194; *Guaranty Trust etc. Co.* v. *Green Cove etc. R. R.*, 139 U. S. 137, 150; *First National Bank* v. *Shedd*, 121 U. S. 74). Phoenix' witnesses released to return at anticipated second stage (see F. R. 259, 282, 363, 368 and affidavits of counsel, F. R. 224-225; 226-228; 228-230). In certain "Suggestions" filed in this court on petition for writ in Foreclosure Cause (No. 438 October Term, 1938) counsel for Trustee Complainants stated: "*The Trustees presented the case in the District Court on the theory, believed to have been accepted by the Master in Chancery, that only one issue was then up for consideration, namely, the right to a foreclosure of the Mortgage Deed of Trust, and assumed that the question of the validity of the bonds would not be taken up until after a foreclosure was ordered (R. 224-230). That is to say, the trustees never pretended to represent bondholders for any other purpose except that relating to the security under the mortgage. At no time did Counsel for the trustees attempt to prove the validity or disprove the invalidity of any individual bond, as such. With the controversy between the mortgagor and the bondholders relating to the validity of individual bonds, the trustees felt they had nothing to do.* * * *." Case never went beyond first procedural stage and Phoenix' evidence was never heard or presented.

138) to the extent held valid. District Court, partially affirming and partially reversing Master, decreed December 1, 1936 (F. R. 202-204):

> "And the Court now being fully advised in the premises, it is Ordered, Adjudged, and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds. *That foreclosure and sale of the mortgaged property be denied* * * *" (italics supplied.)

Phoenix petitioned for rehearing (F. R. 216-223) with supporting affidavits (F. R. 224-391). Denied (F. R. 411). On appeal to Circuit Court of Appeals for the Eighth Circuit, decree below affirmed (Opinion, F. R. 1689-1709, 98 F. (2d) 416; Decree, F. R. 1709). Petition for writ of certiorari to Supreme Court of the United States denied (305 U. S. 650, 676; No. 438 October Term, 1938).

IV.

The Extent of Involvement of the Notes in Suit in the Foreclosure Cause.

The notes in suit for $3125 and $2000 respectively were given to petitioner under the following circumstances:

Meeting of the Board of Directors of Bridge Company held July 7, 1933 at which following resolutions adopted (F. R. 1028-1029):

"5. Vice President English and Secretary Thorson reported that since the December 5, 1932 meeting of the Board they had succeeded in borrowing funds from the Phoenix Finance Corporation for the purpose of taking care of the interest on the corporation's bonds in the approximate amount of $9,821.00 and for the payment of taxes in the amount of $3125.51[7] and for the payment of other pressing bills amounting to several thousand dollars. An itemized statement of all funds advanced by the Phoenix Finance Corporation was presented to the Board members and approved by them. The statement showed moneys advanced by the Phoenix Finance Corporation as follows:

On open account to June 30, 1933 and unpaid $12,110.19
On notes to June 30, 1933 and unpaid..... 5,625.00

6. Upon motion by Mr. Wagner, seconded by Mr. Wilder the following resolution was unanimously adopted:

Resolved, that the vice president and secretary of the corporation be and hereby are instructed to execute the demand note of this corporation in the amount of $12,110.19 with interest at 8% per annum in favor of the Phoenix Finance Corporation in payment of funds advanced by said corporation on open account, and

Be it Further Resolved, that the treasurer of this corporation be and hereby is instructed to pledge $20,-100.00 of the Class B bonds of this corporation as collateral to said note and also to the other notes owing to the Phoenix Finance Corporation by this corporation."[8]

The $5625 item above mentioned included the two notes in suit for $3125 and $2000 respectively and another note,

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[7] The actual consideration for the $3125 note in suit.

[8] Validity of or *consideration* for notes in suit not questioned below. Although defendant pleaded *Non Assumpsit, Statute of Limitations, Payment, Accord and Satisfaction; Set-off* and *Release,* (R. 13) these defenses abandoned and case tried on single issue raised by plea of *res adjudicata.* (R. 28-29, 74.)

not here involved, for $500. The $20,100 Class B bonds of Bridge Company were a part of the authorized issue of $200,000 secured by the Deed of Trust sought to be foreclosed.

The notes in suit represented obligations *originating with Phoenix.* They did not pass through System and were not involved directly or indirectly in any proceeding to which System was a party. The Deed of Trust securing the $200,000 bond issue was authorized at a stockholders' meeting of Bridge Company held December 22, 1931 (F. R. 946, 952, 953). Indenture actually executed on February 20, 1932 although dated as of January 1, 1932 (F. R. 3). The bonds were dated January 1, 1932 (Exhibit 2 (H. E. B.) F. R. 775), but the collateral bonds in the amount of $20,100 authorized at the meeting of July 7, 1933 were not issued and delivered to Phoenix until the latter date.

There was no finding of fact either of the Master or the trial court referrable directly or indirectly to the $2000 note in suit. With respect to the $3125 note the Master found valid consideration (Findings 10 (i), 10 (k), F. R. 133-134).

The Master recommended foreclosure as to $27,125 of bonds, including bonds of face value to secure the $3125 item (F. R. 138). The District Court disapproved Master's findings 10 (i) and 10 (k) (F. R. 179). *The Court, while not denying that said $3,125 note was in itself a valid and subsisting obligation of the Bridge Company to Phoenix, in effect held and found that there was an unliquidated set-off or counterclaim*[9] *of the Bridge Company against Phoenix in the sum of $14,000 which rendered this note unenforceable* (F. R. 177-178; 192-193).

No *decree* or *judgment* with respect to the foregoing was entered in the cause. No defense of set-off or counter-

[9] This set-off or counterclaim bore no relation to the mortgage debt.

claim was pleaded in any form or asserted by way of defense at the trial. No issue was presented in pleadings concerning notes in suit below. No relief was demanded with respect thereto by any prayer of any moving pleading. No judgment or decree has been entered denying or affirming the validity of enforceability thereof.

V.

The Questions Presented.

The questions presented by this petition are as follows:

1. Whether in the Foreclosure Cause petitioner had a proper status as a party against whom a valid adjudication could be made with respect to promissory notes in suit below and if so, whether federal jurisdiction existed to sustain such an adjudication. *Indianapolis* v. *Chase National Bank, infra*).

2. Whether the Delaware Supreme Court has so construed the decree of December 1, 1936 in the Foreclosure Cause (viz., by holding the same to have constituted an adjudication against petitioner as to the notes in suit in the Delaware Court) as to state a case of lack of federal jurisdiction and whether there was the necessary diversity of citizenship to support such federal jurisdiction. (*Indianapolis* v. *Chase National Bank, infra.*)

3. Whether or not the decree of Deecember 1, 1936 in the federal Foreclosure Cause constituted a valid adjudication *in personam* against petitioner with respect to the issues presented in the trial court below and whether or not the pleaded defense of *res adjudicata* should or should not have been sustained.

4. (a) Whether a trustee under a deed of trust securing a bond issue "represents" the bondholders (at least in the absence of express authority), so as to permit an adjudication, in a proceeding to foreclose the deed of trust, of contractual obligations and claims (including counter-claims and set-offs) between a bondholder and the defendant mortgagor.

(b) Whether express authority for such representation appears in the indenture or bonds.

5. Whether or not the "doctrine of representation" should be extended so as to justify the construction of a decree denying mortgage foreclosure, in an action *in rem* or *quasi in rem*, between the trustees of a deed of trust securing a bond issue and the mortgagor, as an adjudication *in personam* against a bondholder with respect to contractual obligations and claims between such bondholder and the mortgagor not directly related to the trust *res* or the common interest of bondholder and trustees therein.

6. Whether or not the courts of Delaware are required by law to give full faith and credit to the decree of December 1, 1936 in the federal Foreclosure Cause insofar as petitioner is concerned, particularly with respect to issues not pleaded or otherwise litigated in said Foreclosure Cause, where petitioner was merely a "formal" party to that cause.

7. Whether or not the Supreme Court of Delaware has so construed the proceedings and decree of December 1, 1936 in the Foreclosure Cause as to deprive petitioner of property without due process of law.

VI.

Reasons Relied on for the Allowance of Writ of Certiorari.

In the exercise by the Supreme Court of its judicial discretion to grant the writ herein prayed, it is submitted by petitioner that there are special and impelling reasons therefor, to wit:

1. The recent case of *Indianapolis* v. *Chase National Bank, infra,* calls for a consideration by this court of the essential limitations on federal jurisdiction in the Foreclosure Cause.

2. With respect to the issues presented in the court below, viz., its right to sue and recover upon the promissory notes in suit, the petitioner has never had its day in court.

3. The Supreme Court of Delaware has upheld as a valid former adjudication against petitioner with respect to the issues presented in the Delaware court, a decree of a federal court denying mortgage foreclosure, in a cause for the foreclosure of a mortgage deed of trust, where petitioner was not an indispensable party or represented with respect to the issues *sub judice,* and where the same issues were not raised or otherwise litigated or decided.

4. The construction given by the Supreme Court of Delaware (reversing a *contra* construction of the Superior Court) to the decree of December 1, 1936 in the federal Foreclosure Cause results in a deprivation of petitioner's property in and to the notes in suit, without due process of law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Delaware, commanding that court to certify and send to this Court for the review and determination on a day certain to be named therein, a true and complete copy of the record and proceedings in this cause in said court, the same being numbered on its docket No. 4 October Term, A. D. 1940 and being entitled "Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Defendant below, Plaintiff-in-Error, v. Phoenix Finance Corporation, a corporation of the State of Delaware, Plaintiff below, Defendant-in-Error", and that upon consideration thereof the decree of said Supreme Court of Delaware be reversed.

And your petitioner, as in duty bound, will ever pray.

PHOENIX FINANCE CORPORATION,
By JAMES R. MORFORD,
Its Attorney.

MARVEL & MORFORD,
Of Counsel.